United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Docket No. 74-1081

To be argued by:
David M. Garber

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IN THE
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

—v—

WILLIAM JEROME HARMON,

Appellee.

On appeal from the United States District Court
Northern District of New York

BRIEF FOR APPELLEE,
William Jerome Harmon

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PRELIMINARY STATEMENT

This is an appeal by the United States of America ("Appellant") from an unreported Decision rendered November 12, 1973 and an Order filed December 11, 1973 of the United States District Court, Northern District of New York, Edmund Port, J., dismissing Counts I, II, IV and VI of the indictment alleging violations by William Jerome Harmon ("Appellee") of 18 U.S.C. §702 and 18 U.S.C. §912.

STATEMENT OF THE ISSUES

1. Do Counts I, II, IV and VI of the indictment alleging that Appellee pretended to be an Air Force Sergeant and a returned prisoner of war, by itself and without an allegation that Appellee committed any act to implement the pretense, allege a violation of 18 U.S.C. §912?

2. Is "intent to defraud" a necessary element of 18 U.S.C. §912?

STATEMENT OF THE CASE

Appellant was indicted for his alleged violations of 18 U.S.C. §912 and §702 (1, 2, 3).*

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* References are to pages of Appellant's Appendix.

Thereafter, by timely pre-trial motion, Appellee moved to dismiss Counts I, II, IV and VI of the indictment alleging Appellee's violation of 18 U.S.C. §912 ("§912"), false personation of a federal employee or officer, upon the grounds that these counts did not allege an offense (4-8).

DISPOSITION BELOW

By decision dated November 13, 1973 (11-16) and by order filed December 11, 1973 (17,18) the District Court granted Appellee's motion to dismiss.

The Court held that Counts I, II, IV and VI did not allege that Appellee did anything in addition to the pretense alleged, and therefore, that those counts did not state sufficient facts to constitute a crime under §912 (12,13).

Additionally, the Court held that Counts I, II, IV and VI were insufficient and defective as they did not allege that Appellee acted with an intent to defraud (13,14).

POINT I

COUNTS I, II, IV AND VI OF THE INDICTMENT ARE DEFECTIVE IN THAT THEY DO NOT ALLEGE ANY ACT IN ADDITION TO THE ALLEGED PRETENSE.

The first clause of §912 expressly employs two significant phrases: (1) "assumes or pretends" and (2)

"acts as such." These phrases make clear there must be proof of two prerequisites: firstly, the pretense of being an officer or employee of the United States; and secondly, and in addition to the pretense, that the defendant "act" in the apparent exercise of the power or privilege of his assumed position. United States v. Barnow, 239 U.S. 74, 36 S.Ct. 19, 60 L. Ed. 155 (1915); United States v. Harth, 280 F.Supp. 425 (W.D. Oklahoma, 1968).*

Counts I, II, IV and VI of the indictment allege two pretenses but they allege no act. They state that Appellee falsely stated that he was a Sergeant in the United States Air Force and that he falsely pretended to be a recently returned Vietnam prisoner of war. There is no allegation that Appellee did anything or committed any act in addition to these pretenses.

Counts I, II, IV and VI of the indictment are similar to indictments found insufficient and defective in Ekberg v. United States, 167 F.2d 380 (1st Cir. 1948); in Baas v. United States, 25 F.2d 294 (5th Cir. 1928) and in United States v. Larson, 125 F.Supp. 360 (D.C., Alaska, 1954).

In Ekberg v. United States, supra, 167 F.2d 380, 382, the indictment alleged that the defendant pretended

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* Appellee contends that a third element of proof, an intent to defraud, is required by §912. See Point II.

to be

> ... an officer and employee acting under the authority of the United States, to wit, an officer and employee of the United States Engineer Office of the United States War Department, and did take upon himself to act as such officer and employee, in that he called by telephone [a named person] and falsely pretended to him that he was such an officer and employee of the United States.

The indictment was insufficient as the overt act alleged was a repetition of the false representation.

Again, in United States v. Larson, supra, 125 F.Supp. 360, an indictment alleging that defendant impersonated an officer of the United States

> ... and falsely took upon himself to act as such, in that he falsely stated to [a named person] that he was a special agent of the Federal Bureau of Investigation engaged in the investigation of a criminal violation...

was insufficient as it failed to allege that defendant engaged in something other than the pretense charged.

Still again, in Baas v. United States, supra, 25 F.2d 294, an indictment alleging that the defendants pretended to be officers of the United States and acted as officers of the Bureau of Prohibition was defective since it did not allege that the defendants did anything in their assumed capacity.

The indictment reviewed in United States v. Harth, supra, 280 F.Supp. 425 illustrates what good pleading requires to allege a violation of the first clause

of §912. There, the indictment alleged that the defendant had pretended to be an employee of the Internal Revenue Service and that he had stated that he was engaged in locating the whereabouts of a named person, a tenant of the person to whom the pretense was made. The court held that the indictment was sufficient as it alleged that the defendant had committed an act, in addition to, and different from, the pretense charged.

Appellee's pretending to be a returned prisoner of was is an expansion of his pretending to be a Sergeant in the Air Force. Counts I, II, IV and VI of the indictment are defective as they contain no allegation that Appellee did anything or committed any act in addition to the pretenses alleged.

POINT II

ABSENCE OF AN ALLEGATION OF EITHER AN INTENT TO DEFRAUD OR DECEITFUL PURPOSE RENDERS COUNTS I, II, IV AND VI DEFECTIVE.

Appellant cites United States v. Mitman, 459 F.2d 451 (9th Cir. 1972), cert. den., 409 U.S. 863 (1972) and United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967), cert. den. 392 U.S. 927 (1968) in support of its position that intent to defraud is not a necessary element of the offense of false personation of a federal employee or

officer. However, the Court of Appeals, Fifth Circuit has held to the contrary in two cases: United States v. Randolph, 460 F.2d 367 (5th Cir. 1972) and Honea v. United States, 344 F.2d 798 (5th Cir. 1965).

It is respectfully submitted that the rule of the Court of Appeals, Fifth Circuit, requiring an intent to defraud, is the correct one as it is consistent with the legislative history and with the requirement of a criminal intent necessary for the common law crime of false personation.

Although §912 does not expressly require an intent to defraud, the cases have interpreted similar statutory offenses to require the element of intent. This construction is based upon the requirement of intent in similar common law crimes. Levine v. United States, 261 F.2d 747 (D.C. Cir. 1958); Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L. Ed. 288 (1952).

Levine v. United States, supra, 261 F.2d 747 involved the construction of a section of the District of Columbia Code providing that "whoever falsely represents himself to be a . . . police officer . . . and attempts to perform the duty or exercise the authority pertaining to any such officer or character . . . shall suffer imprisonment . . ." This statute, like §912, did not expressly require a criminal intent as an element of the crime. However, the

Court, noting that the statute had its roots in the common law crime of false personation which required a specific criminal intent, held that some form of criminal intent was necessary to allege a violation of the statute.

Again, in Morissette v. United States, supra, 342 U.S. 246, 72 S.Ct. 240, 96 L. Ed. 288, the Supreme Court construed 18 U.S.C. §641, respecting theft of government property, as requiring criminal intent, although that element was omitted from the statutory definition. The Court reasoned that criminal intent was a requirement of the common law crime of larceny and it believed that elimination of the requirement of a guilty intent would deprive the defendant of the "benefit as he derived at common law from innocence of evil purpose," 342 U.S. at 263, 72 S.Ct. at 249, 96 L. Ed. at 300.

The elimination of the element of fraudulent intent would unreasonably expand the scope of §912 so as to make criminal otherwise naive or foolish pretensions, boasting, or even a false bravado. United States v. Randolph, supra, 460 F.2d 367. It is not unusual for a person to innocently hand out a "line." No harm is thereby done and no evil is involved unless it appears that it is being done with the intent to defraud. It is only in the latter situation that a crime is indicated.

Additionally, the implementation of §912 in Form 8 of the Federal Rules of Criminal Procedure contains an "intent to defraud" allegation and it is a "strong indication of what good pleading requires under the statute." United States v. Randolph, supra, 460 F.2d 367, 370.

Appellant contends that the fact that former 18 U.S.C. §76, the predecessor to §912, expressly required an intent to defraud and the fact that the revisers' notes state that intent was omitted as meaningless in view of United States v. Lepowitch, 318 U.S. 702, 63 S.Ct. 914, 87 L. Ed. 1091 (1941) evidences an affirmative attempt to do away with the requirement of intent to defraud (Appellant's Brief, p. 6).

A complete answer to Appellant's argument is found in United States v. Randolph, supra, 460 F.2d 367, 370:

> The 1948 revision of the statute was generally, with a few exceptions, not intended to effect substantive changes in federal criminal law. The revisers indicated that in §912 they were responding to Lepowitch in relating the "intent to defraud" wording as "meaningless." However, Lepowitch did not hold that an allegation of intent to defraud was unnecessary, but instead defined the nature of the "fraud" required. Finally, there is nothing to indicate that Congress in the course of a structural recodification intended to greatly expand the scope of the statute so as to make more foolish bravado without any intent to deceive a federal felony.

There is no allegation in Counts I, II, IV and VI of the indictment that Appellee acted with an intent to defraud or with a wrongful purpose in pretending to be an Air Force Sergeant and a returned prisoner of war. The failure to allege the element of fraudulent intent is a fatal defect requiring the dismissal of Counts I, II, IV and VI of the indictment. United States v. Randolph, supra, 460 F.2d 367; Honea v. United States, supra, 344 F.2d 798.

CONCLUSION

For the foregoing reasons the order dismissing Counts I, II, IV and VI of the indictment should be affirmed.

Respectfully submitted,

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RE: UNITED STATES OF AMERICA v. WILLIAM JEROME HARMON

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

EVERETT J. REA , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of BOND, SCHOENECK & KING, Attorneys for Appellee, William Jerome Harmon,

(s)he personally served three (3) copies of the printed [Record] [Brief] [Appendix] of the above-entitled case addressed to:

EUGENE WELCH, ESQ.
Assistant United States Attorney
Federal Bldg.
Syracuse, N. Y. 13201

by depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York on March 21, 1974.

Everett J. Rea
Everett J. Rea

Sworn to before me this 21st
day of March , 1974.

Ruth S. Moloughney
Commissioner of Deeds

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